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IN THE

Supreme Court of the United States

October Term, 1969

No. 11

BURTON MARKS,

Petitioner,

vs.

THE CHIEF OF POLICE OF THE CITY OF LOS ANGELES, and THE CITY OF LOS ANGELES,

Respondents.

On Appeal from the California Court of Appeal, Second Appellate District

JURISDICTIONAL STATEMENT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1969
No. .....

BURTON MARKS,

Petitioner,

vs.

THE CHIEF OF POLICE OF THE CITY OF LOS ANGELES, and THE CITY OF LOS ANGELES,

Respondents.

On Appeal from the California Court of Appeal, Second Appellate District

JURISDICTIONAL STATEMENT

Petitioner appeals from the judgment of the California Court of Appeal, Second Appellate District, entered on October 23, 1969, affirming a judgment against him by the Superior Court of the State of California, in and for the County of Los Angeles, and submits this Statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that a substantial question is raised.

OPINIONS BELOW

There were no reported opinions below. We are attaching hereto as Appendix "A" [1] the opinion of the Court of Appeal of the State of California, Second Appellate District, certified for nonpublication (Appendix "A" pp. 1-7); [2] notice of denial of Petition for Rehearing filed in the Court of Appeal of the State of California, Second Appellate District (Appendix "A" p. 8); [3] notice of denial of Petition for Hearing filed in the Supreme Court of the State of California (Appendix "A" p. 9); and [4] the Findings of Fact of the Superior Court of the State of California, for the County of Los Angeles (Appendix "A" pp. 10-13).

JURISDICTION

The judgment against petitioner was entered in the Superior Court of Los Angeles County on April 15, 1968; it was affirmed by the Court of Appeal of the State of California, Second Appellate District, on October 23, 1969, a Petition for Rehearing being denied on October 29, 1969; the Supreme Court of the State of California denied a hearing on December 17, 1969; and a Notice of Appeal was filed in the Court of Appeal of the State of California, Second Appellate District, on January [illegible], 1970. Petitioner made a timely objection to a state statute, contending that it was void and standardless. As the state court decision was in favor of the validity of a statute contended to be repugnant to the United States Constitution, jurisdiction is conferred by 28 U.S.C. section 1257(2). Cases which support this appeal are:

N.A.A.C.P. v. Button, 371 U.S. 415 (1963); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964); *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966); *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *Connally v. General Constr. Co.*, 269 U.S. 385 (1926); *Screws v. United States*, 325 U.S. 91 (1943).

QUESTIONS PRESENTED

[1]

Whether the assessment of a penalty under California Rule of Court 26(a) is impermissible due to the vagueness of that rule.

[2]

Whether a court's refusal to consider an otherwise valid claim for property because that property was connected with an illegal transaction is a forfeiture of such property without a hearing and is thus violative of the due process clause.

STATUTE INVOLVED

Rule 26(a), California Rules of Court, [West 1964] is set forth as Appendix "B."

STATEMENT OF THE CASE

Petitioner, assignee of Barbara Williams, filed an action for claim and delivery of $12,020.00 held by the Chief of Police of the City of Los Angeles (respondent here along with the City of Los Angeles). Judgment was entered in favor of defendants (CT 36; Appendix A, *infra*) on April 15, 1968. The action was for the recovery of sums of money paid by

Barbara Williams to Paul G. Franey, a Police Officer of the City of Los Angeles.[1] The money was turned over by the officer to the Los Angeles Police Department and was segregated by that Department to be used as evidence in a bribery prosecution against Miss Williams. (CT 30)

Petitioner dully appealed the judgment against him to the California Court of Appeal. On October 23, 1969, the Court of Appeal affirmed the judgment and assessed a penalty of $250.00 against petitioner for filing a "frivolous" appeal (Appendix A, *infra*). Petitioner petitioned the Court of Appeal for a rehearing, contending that Rule 26(a) of the California Rules of Court, under which the penalty was assessed, was unconstitutionally vague and was therefore void as violative of the due process clause. The petition for rehearing was denied on October 29, 1969 (Appendix A, *infra*). Petitioner then petitioned the California Supreme Court for a hearing on the same grounds, and it, too, was denied (Appendix A, *infra*). The denials by the Court of Appeal and the California Supreme Court of petitioner's petitions for rehearing and hearing were, in effect, findings that the Rule is not in conflict with the strictures of the United States Constitution, and petitioner appeals to this

---

1 The following sums were paid:

a) August 4, 1965, $220 as partial payment of $500 for obtaining a continuance of a sentencing matter ($20 of this sum was to reimburse Officer Franey for long distance telephone calls) (RT 49).

b) August 26, 1965, $3,300, of which $1,500, or so much thereof as Franey decided was needed, was to be used as restitution to the victim of a "bunco scheme," Officer Franey to keep any balance of the $1,500 for himself; the rest was to "fix" the case (RT 49, 51, 52).

c) August 26, 1965, $300 as the balance of the $500 for obtaining the continuance referred to in "a)" above (RT 53).

d) August 26, 1965, $500 for the arrest of two men (RT 76, 77).

e) September 27, 1965, $8,500, of which $2,000 was a "pay-off" for Franey and $6,500 was to be used for restitution in "b)" above (RT 55, 56).

Honorable Court for a review of these decisions.

THE SUBSTANTIALITY OF THE QUESTIONS

[1] The conduct that Rule 26(a), California Rules of Court, can be used to punish the filing of a "frivolous" appeal is not unimportant conduct when viewed in light of the First Amendment and the cases of this Court discussing that amendment. "[P]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms . . . for standards of permissible statutory vagueness are strict in the area of free expression." *N.A.A.C.P. v. Button, supra,* 371 U.S. 415, 428, 432 (1963). See also *Keyishian v. Board of Regents,* 385 U.S. 589, 603-604 (1967); *Dombrowski v. Pfister,* 380 U.S. 479, 494 (1965); *Aptheker v. Secretary of State, supra,* 378 U.S. 500, 516 (1964).

While this Court has consistently held that freedom of expression is a precious right (see, *e.g., N.A.A.C.P. v. Button, supra; Dombrowski v. Pfister, supra*), in the instant case this right is especially so. For here, the expression penalized is expression of the highest order: the request of counsel for judicial review of an adverse determination of his client's rights. Thus, the factor of the freedom of counsel also enters this case.

In *Cammer v. United States,* 350 U.S. 399 (1956), this Court quoted Congressman James Buchanan on the independence of the bar: "The public have almost as deep an interest in the independence of the bar as of the bench" (350 U.S. at 407). *Cammer* restricted the applicability of summary contempt and quoted Buchanan's statements at the trial of Judge James Pike, whose abuse of his contempt power led to the passage of

the Contempt Act.

The inquiry here is not dissimilar, for we have a statute, without standards, which allows a judge to determine what is "frivolous" and then fashion a penalty to fit the crime. Surely the limits of frivolity would depend upon the outlook of the judge, and the penalty would depend upon the extent of his anger.

As this Court can see by viewing the Rule, which is set forth as Appendix "B," it is not at all precise. Aside from the fact that the word "frivolous" is not defined, the section makes reference to a party being "guilty of any other unreasonable infraction of the rules," and says that the court may "impose . . . such penalties . . . as the circumstances of the case and the discouragement of like conduct in the future may require." This is not the kind of statute which tells men of common intelligence what it requires (see *Connally v. General Constr. Co., supra,* 269 U.S. 385, 391 (1926)), nor does it fix standards as to what is prohibited (see *Giaccio v. Pennsylvania, supra,* 382 U.S. 399, 402-403 (1966)); but leaves judges "free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case" *Giaccio v. Pennsylvania, supra,* 382 U.S. at 402-403.

The teaching of these cases, especially when viewed in light of the strict test required by *N.A.A.C.P. v. Button, supra,* requires a finding that the Rule is violative of the due process clause.

[2] The trial court's refusal to consider the merits of petitioner's claim to the money in question because some of it was tainted by illegality was a denial of that property

without due process and violated petitioner's rights under the Fourteenth Amendment. Without considering whether the court could, consistent with the Constitution, refuse to consider petitioner's suit had he tried to get the "illegal objects [of the contract] carried out" (Conclusion of Law III, CT 33[2]), where one party was the State, it seems clear that the case at bar did not involve such a request. Here, petitioner wished to have specific and identified monies, held by the State, returned to him. The fact that *some* of the money was paid to a police officer in the form of bribes caused the courts below to deny petitioner the right to *all* of the money; and to eschew a hearing to determine if, in fact, some of the money was untainted.

The right to a hearing to consider "adjudicative" questions is not a novel or new one. In 1913, this Court said the following in discussing the importance of a hearing:

> "A finding without evidence is arbitrary and baseless. [I]f the Government . . . is correct . . . [i]t would mean where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority . . . is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power."
>
> *ICC v. Louisville & N. R. Co.*, 227 U.S. 88, 91 (1913);

see also *Southern Ry. Co. v. Virginia*, 290 U.S. 190 (1933).

---

2 Conclusion of Law III – "That the Assignor, Barbara Williams, was a party to an illegal contract, and neither the Assignor, nor the Assignee, Burton Marks, may come into a court of law and ask to have the illegal objects carried out, nor can they set up a case in which they must necessarily disclose the illegal purpose as the groundwork of their claim." (CT 33)

The failure of the trial court to attempt, by use of a hearing, to segregate those sums which were not tainted by the illegality—and which therefore should be available to petitioner—requires reversal. Further, a review of the doctrinaire approach to denying a litigant access to a court on the ground of "*in pari delicto*" requires new analysis in light of constitutional rights guaranteed under the Fourteenth Amendment, which cannot be legislated away by the courts.

Petitioner contends that the decisions below failed to treat properly the questions of vagueness and denial of a hearing raised below. We feel that the questions presented by this appeal[3] are substantial and that the decisions below are in conflict with those of this Court.

Respectfully submitted,

MARKS, SHERMAN & LONDON

BY: BURTON MARKS

Attorneys for Petitioner

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3 If this appeal be improvidently taken, it is respectfully requested that this statement be treated as a petition for certiorari.

APPENDIXES

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APPENDIX "A"

OPINION OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA SECOND APPELLATE DISTRICT

(Certified for nonpublication)

BURTON MARKS, Plaintiff and Appellant, vs. THOMAS REDDIN, as Chief of Police of the City of Los Angeles, and the CITY OF LOS ANGELES, Defendants and Respondents.

Civ. No. 33712.

Filed October 23, 1969.

APPEAL from a judgment of the Superior Court, Los Angeles County. Arnold Praeger, Judge. Affirmed.

Judgment for Defendants in a complaint for claim and delivery, affirmed.

Marks, Sherman & London and Burton Marks (*in propria persona*) for Plaintiff and Appellant.

Roger Arnebergh, City Attorney (Los Angeles), John A. Daly and George J. Franscell, Assistant City Attorneys, and William B. Burge, Deputy City Attorney, for Defendants and Respondents.

Plaintiff, an attorney at law, sues, as the assignee of Barbara Williams, to recover $12,020, held by the Chief of Police of the City of Los Angeles. As disclosed by the pleadings and record, the defendants came into possession of this sum of money under the following circumstances:

Barbara Williams was interested in assisting Vine Stevens, Catherine Adams and Keki Williams, who were being prosecuted, or who were in danger of being prosecuted, for certain criminal conduct, and to secure the arrest and prosecution of Miller Guy and Nido Lee. In that connection, she paid the total sum of $12,020 to Officer Franey of the Los Angeles Police Department, for the following purposes:

(a) August 4, 1965, $220 as partial payment of $500 for obtaining a continuance in a sentencing matter of Vine Stevens ($20 of this sum was to reimburse Officer Franey for long distance telephone calls).

(b) August 26, 1965, $3,300, of which $1,500, or so much thereof as Franey decided was needed to be used as restitution to the victim of a bunco scheme perpetrated by Catherine Adams in order to stop the prosecution of said Catherine Adams, Officer Franey to keep any balance of said $1,500 for himself; and $1,000 for Officer Franey to use to "fix" the case against Catherine Adams, that is to fix the case so it wouldn't be prosecuted.

(c) August 26, 1965, $300 as the balance of $500 promised Officer Franey for obtaining a continuance for the sentencing of Vine Stevens.

August 26, 1965, $500 to arrest Miller Guy and Nido Lee.

(d) September 27, 1965, $8,500 of which $6,500 was "to take care of it so Cathy (Catherine Adams) won't be prosecuted" and a warrant for Keki Williams be withheld or withdrawn on a charge which Officer Franey had previously annulled. Officer Franey

was to use part or all or more of this sum as restitution to the victim and to keep any balance for himself; and the sum of $2,000 as payment to Officer Franey for not prosecuting either Catherine Adams or Keki Williams.

At all times, Officer Franey was acting in the course and scope of his duties as a police officer with the knowledge of and under the orders of his superiors; he received the monies in that capacity and without intent to be influenced in any official action; he turned the monies, as received, over to his superiors and they are held by the defendant city in segregated accounts. Barbara Williams has pled guilty to a violation of section 67 of the Penal Code (bribery) in connection with the transactions above set forth.

The trial court entered judgment for defendants on the ground that plaintiff had not filed a claim as required by the Government Code and on the ground that plaintiff was barred from recovery on grounds of public policy. Since we affirm on the latter ground, we need not consider whether or not plaintiff's claim, if otherwise cognizable, falls within the claims statute.

Plaintiff argues as follows:

(1) To permit the city to keep the money is a "forfeiture" prohibited by the Penal Code and by the Constitution.

(2) That, even if a bribe was involved, not all the money was tainted by a bribe, and therefore plaintiff was entitled to some of the money.

(3) There was no contract between the police officer and the assignor.

Plaintiff's contention that allowing the city to keep the money is a "forfeiture" prohibited by Penal Code section 2604 is not well taken. The court in the case of *Lee On v. Long* (1951) 37 Cal.2d 499, stated in part as follows:

> "Consistent with the general rule governing the construction of statutes involving forfeitures (12 Cal.Jur. sec. 3, pp. 633-634), the trial court properly recognized the limits of its express statutory authority and denied the county's petition for forfeiture 'as far as the money [was] concerned.' (*Cf. Chapman v. Aggeler*, 47 Cal.App.2d 848, 860-861 [119 P.2d 204].) *However, the present case on appeal does not concern the law of forfeiture, but rather relates to the question of whether plaintiffs, admittedly engaged in illegal gambling activities at the time of the raid and their arrest, are in a position to assert their ownership and right to possession of the money that was then in actual use in such activities, and to enlist the aid of the court in seeking to have it restored to them.*
>
> " 'No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim.' (17 C.J.S. sec. 272, p. 656.)" (Emphasis added.)

Plaintiff argues that the *Lee On* case is "not the law of this state any longer." Plaintiff cites no case overruling

Lee On, and our own research has not disclosed any. Nor are plaintiff's attempts to distinguish *Lee On v. Long* from the instant case persuasive. The principles of law are the same whether the facts involved gambling, as in *Lee On*, or a bribe, as in the instant case.

II

Plaintiff next argues that, even assuming some illegal transaction, not all of the transactions were tainted. The rule is that a party to an illegal contract may not successfully invoke judicial aid to have his illegal objects carried out, nor set up a case in which he must necessarily disclose an illegal purpose as a basis for his claim. The test is whether the plaintiff can establish his case otherwise than through the medium of an illegal transaction to which he himself is a party. (*Lee On v. Long, supra* (1951) 37 Cal.2d 499.) Since plaintiff cannot establish his case without raising the illegal transactions, whether or not each and every individual transaction, considered alone and not in the context of a series of transactions, is in itself illegal, does not help plaintiff's case.

Further, it is clear that all the moneys given by Officer Franey were related to illegal transactions. The word "bribe" is defined as follows:

> "The word 'bribe' signifies anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given in his action, vote, or opinion, in any public or official capacity;" (Pen. Code, sec. 7, subd. 6.)

A bribe contemplates a promise to give a public officer anything, which may have a future existence and value, with the intent to unlawfully influence him in his official action. (*People v. Vincilione* (1911) 17 Cal.App. 513, 515.) It is clear that plaintiff's assignor in the case at bench was attempting to unlawfully influence the officer in his official action in each transaction.

Plaintiff argues that some of the money was paid to Officer Franey to be paid by him to the victims of the various fraudulent transactions indulged in by the persons arrested or suspected of such crimes and that reimbursement of victims is a lawful—even a commendable—act and not illegal. But the arrangement was that the officer could keep for himself all monies not needed to satisfy the several victims; as far as the record discloses, the victims might have been satisfied with minimal amounts. It follows that plaintiff cannot segregate any specific sum that was devoted to a lawful purpose, even if he legally could disengage the parts of single payments. Since the record does not disclose the purpose of the telephone calls involved in the August 4th payment, we cannot say that they were not made as part of the over-all bribery scheme.

III

Plaintiff contends that he is entitled to recover because a contract was never formed between Officer Franey and plaintiff's assignor. The court in the *Vollman* case said: "In this connection it must be remembered that no 'meeting of the minds' is required to establish an agreement to take a bribe." (*People v. Vollman* (1946) 73 Cal.App.2d 769, 788.) Further, in *Schur v. Johnson* (1934) 2 Cal.App.2d 680, it

was held that courts will not lend aid to transactions founded on illegal contracts *or* acts in violation of law. And in *Berka v. Woodward* (1899) 125 Cal. 119, the California court, quoting from an earlier case, said that no court shall lend its aid to a man whose grounds for action are based on an illegal or immoral act.

Thus, the existence or nonexistence of a contract is irrelevant. It is clear that the money was given with a corrupt intent by plaintiff's assignor to influence official action, and that is sufficient to preclude plaintiff from using the courts to recover money.

The judgment is affirmed. The appeal is strictly frivolous. In addition to the usual costs on appeal, appellant shall pay, to the clerk of this court, the sum of $250 as a penalty for taking a frivolous appeal.

KINGSLEY, J.

We concur:

JEFFERSON, Acting P.J.

DUNN, J.

Certified for nonpublication in the Official Reports pursuant to rule 976.

JEFFERSON, Acting P.J.

KINGSLEY, J.

DUNN, J.

NOTICE OF DENIAL OF PETITION FOR REHEARING

Court of Appeal of the State of California
Second Appellate District

Los Angeles, Cal. [illegible]

TITLE { Weeks vs. Colton, et al } No. 3[illegible]

The Court:

PETITION FOR REHEARING DENIED.

[illegible]

[illegible] Wd [illegible]

CLAY ROBBINS,

NOTICE OF DENIAL OF PETITION FOR HEARING

Supreme Court of the State of California

19

3 71

Clerk

Respectfully,

WILLIAM L. SUPPLEE

Clerk

FINDINGS OF FACT
Of
The Superior Court of the State of California
For the County of Los Angeles

BURTON MARKS, Plaintiff, vs. THAD BROWN, Chief of Police of the City of Los Angeles; et al., Defendants.

No. 898 013.

The above-entitled action came on regularly for trial on the 22nd day of March, 1968, in Department 24, the Honorable Arnold Praeger, Judge Presiding, the Court sitting without a jury, neither party having requested same; . . . and the cause having been heard, and the evidence, both oral and documentary having been introduced and received on behalf of said Plaintiff and said Defendants, and the Court having considered the same and having considered the stipulations entered into by and between said Plaintiff and said Defendants, and having heard the arguments of counsel, and being fully advised, makes the following FINDINGS OF FACT:

It is true that:

I

The CITY OF LOS ANGELES is a municipal corporation, organized and existing under and by virtue of the laws of the State of California, and that THOMAS REDDIN is the Chief of Police of the City of Los Angeles.

II

The CITY OF LOS ANGELES has the sum of $12,020.00 which is being held pursuant to DR No. 65-537976.

III

At all times mentioned in Plaintiff's Complaint Paul J. Franey was, and now is, a duly qualified, appointed, and acting police officer of the City of Los Angeles and peace officer of the State of California, acting within the scope of his authority and engaged in the regularly assigned duties of his office in good faith and without malice.

IV

On August 4, 1965, Barbara Williams, a gypsy, gave to Paul J. Franey, a police officer, the sum of $220.00. That twenty dollars of this sum consisted of two ten-dollar bills, given to Paul J. Franey to reimburse him for the cost of telephone calls made by him to her in San Francisco. That the balance consisted of two one hundred-dollar bills, given to Paul J. Franey for having obtained a continuance of a criminal trial concerning a fellow gypsy named Vine Stevens. That this sum was to forestall and keep Vine Stevens from going to jail.

V

On August 26, 1965, Barbara Williams gave to Paul J. Franey, acting as a police officer, $3,300.00. That of this sum $1,500.00 was to attempt to make restitution to a victim of a bunco involving a fellow gypsy. That it was understood that Sgt. Franey could give all of this sum to the victim, or any sum, or keep all of the sum for himself. That $1,000.00 was given to fix Katherine Adams' grand theft case, $500.00 was given to Paul J. Franey to arrest Miller Guy and Nido Lee on any charge Sgt. Franey desired, and $300.00 was given as a final payment to Sgt. Franey for having obtained a continuance of the criminal trial involving Vine Stevens, thus forestalling said person from being

incarcerated.

VI

On September 27, 1965, Sgt. Paul J. Franey received the sum of $8,500.00 from Barbara Williams. That $2,000.00 of this sum was given to Sgt. Franey to quash any and all criminal actions contemplated and/or pending against Kathy Williams and Keki Williams. That the balance, $6,500.00, was given to Sgt. Paul J. Franey to satisfy the victims of various buncos from gypsies. That it was understood that Sgt. Paul J. Franey may keep this sum, or use whatever portion he believed would be necessary to satisfy the victims.

VII

All victims mentioned in the preceding paragraphs did in fact receive restitution.

VIII

Barbara Williams assigned whatever right, title, and interest she may have had to the sum of $12,020.00 to BURTON MARKS, Plaintiff herein.

IX

BURTON MARKS is an attorney at law, and duly licensed to practice in the State of California.

X

At no time did the Plaintiff, BURTON MARKS, or Barbara Williams, or anyone acting on their behalf, file a claim with the City Clerk of the City of Los Angeles pursuant to Section 900 et sequitur of the Government Code of the State of California.

XI

The allegations in the Second, Separate and Distinct Defense as set forth in the Answer of the Defendant, CITY OF LOS ANGELES, to the Plaintiff's Amended Complaint for Claim and Delivery are true:

XII

As a result, the Assignor, Barbara Williams, was sentenced to State Prison.

XIII

The only parties Defendant involved in this lawsuit are the CITY OF LOS ANGELES and THOMAS REDDIN, as Chief of Police, only.

DATED: This ..... day of April, 1968.

APPENDIX "B"

CALIFORNIA RULES OF COURT, RULE 26(a)
[West 1964]

Rule 26. Costs On Appeal

(a) [Right to costs] Except as hereinafter provided, the prevailing party shall be entitled to his costs on appeal as an incident to the judgment on appeal. In the case of a general and unqualified affirmance of the judgment, or the dismissal of an appeal, the respondent shall be deemed the prevailing party; in the case of a reversal, in whole or in part, or of a modification of the judgment, the appellant shall be deemed the prevailing party. In any case in which the interests of justice require it, the reviewing court may make any award or apportionment of costs which it deems proper. In probate cases, in the absence of an express direction for costs by the reviewing court, costs on appeal shall be awarded to the prevailing party, but the superior court shall decide against whom such award shall be made. The foregoing provisions do not apply in criminal cases. Where the appeal is frivolous or taken solely for the purpose of delay or where any party shall have required in the typewritten or printed record on appeal the inclusion of any matter not reasonably material to the determination of the appeal, or has been guilty of any other unreasonable infraction of the rules governing appeals, the reviewing court may impose upon offending attorneys or parties such penalties, including the withholding or imposing of costs, as the circumstances of the case and the discouragement of like conduct in the future may require. As amended, effective Jan. 1, 1959.

State of California)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 315 Third Street, Huntington Beach, California 92646, that on JANUARY , 1970, I served the within JURISDICTIONAL STATEMENT (MARKS v. THE CHIEF OF POLICE OF THE CITY OF LOS ANGELES, et al.) on the following named parties by depositing the designated copies thereof in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

COUNTY CLERK, COUNTY OF LOS ANGELES
111 NORTH HILL STREET
LOS ANGELES, CALIFORNIA 90012
FOR: HON. ARNOLD PRAEGER, JUDGE OF THE SUPERIOR COURT [1 copy]

CITY ATTORNEY, CITY OF LOS ANGELES
2102 CITY HALL
LOS ANGELES, CALIFORNIA 90012 [2 copies]

THE SOLICITOR GENERAL OF THE UNITED STATES
WASHINGTON, D. C. [2copies]

COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
217 WEST FIRST STREET
LOS ANGELES, CALIFORNIA 90012 [3 copies]

I declare under penalty of perjury that the foregoing is true and correct.

Executed on JANUARY , 1970, at HUNTINGTON BEACH, CALIFORNIA.

D. A. Standefer

41 copies to the Supreme Court of the United States Washington, D. C.

Dean-Standefer Co., 315 3rd St., Huntington Beach, Ca. 92646 (714) 536-7161

SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term, 1969
No. .....

BURTON MARKS,

Petitioner,

vs.

THE CHIEF OF POLICE OF THE CITY OF LOS ANGELES, and THE CITY OF LOS ANGELES,

Respondents.

On Appeal From the California Court of Appeal, Second Appellate District.

MOTION TO AFFIRM JUDGMENT OR DISMISS THIS APPEAL.

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Attorney for Respondents.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 685-9790

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IN THE

Supreme Court of the United States

October Term, 1969
No. .....

BURTON MARKS,

Petitioner,

vs.

THE CHIEF OF POLICE OF THE CITY OF LOS ANGELES, and THE CITY OF LOS ANGELES,

Respondents.

On Appeal From the California Court of Appeal, Second Appellate District.

MOTION TO AFFIRM JUDGMENT OR DISMISS THIS APPEAL.

The Respondents, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the judgment of the Superior Court of the State of California for the County of Los Angeles, rendered and entered on April 15, 1968, be affirmed, or that the appeal taken therefrom to this Court be dismissed on the ground that the federal question sought to be reviewed was not expressly passed on, and upon the further ground that the judgment appealed from rests on an adequate nonfederal basis, and finally upon the ground that it is manifest that the questions on which the decision of the cause depends, are so unsubstantial as not to need further argument.

Statement of Facts.

The following statement of facts is based upon the factual statement of the California Court of Appeal, Second District set forth in its opinion [Appendix "B" *infra*] (which must be accepted as true, since the Petitioner herein in filing his petition for rehearing before that Court under Rule 28(b) of the Rules on Appeal and adopted by the Judicial Council of the State of California, never requested a correction of the record to that Court before filing his petition for hearing in the California Supreme Court).

The Petitioner, an attorney at law, and assignee of Barbara Williams, commenced proceedings in this matter by filing an action for claim and delivery in the Superior Court of the State of California for the County of Los Angeles to recover the sum of $12,020.00, held by the Chief of Police of the City of Los Angeles.

Barbara Williams was interested in assisting Vine Stevens, Catherine Adams, and Nikki Williams, who were being prosecuted, or in danger of being prosecuted for various crimes, and further in securing the arrest and prosecution of Miller Gore and Nido Lee. In this connection, Miss Williams paid various sums of money totalling $12,020.00 to Officer Dahl Pitney, a police officer for the City of Los Angeles.

The Dates and Purposes of Such Payments Are as Follows:

"(a) August 4, 1965, $220 as partial payment of $500 for obtaining a continuance in a sentencing matter of Vine Stevens ($20 of this sum was to reimburse Officer Pitney for long distance telephone calls).

"(b) August 26, 1965, $3,300, of which $1,500, or so much thereof as Franey decided was needed to be used as restitution to the victim of a bunco scheme perpetrated by Catherine Adams in order to stop the prosecution of said Catherine Adams, Officer Franey to keep any balance of said $1,500 for himself; and $1,000 for Officer Franey to use to 'fix' the case against Catherine Adams, that is to fix the case so it wouldn't be prosecuted.

"(c) August 26, 1965, $300 as the balance of $500 promised Officer Franey for obtaining a continuance for the sentencing of Vine Stevens.

August 26, 1965, $500 to arrest Miller Guy and Nido Lee.

"(d) September 27, 1965, $8,500 of which $6,500 was "to take care of it so Cathy (Catherine Adams) won't be prosecuted' and a warrant for Keki Williams be withheld or withdrawn on a charge which Officer Franey had previously annulled. Officer Franey was to use part or all or more of this sum as restitution to the victim and to keep any balance for himself; and the sum of $2,000 as payment to Officer Franey for not prosecuting either Catherine Adams or Keki Williams."

As a result of such payments criminal charges of Bribery, a violation of Section 67 of the Penal Code of the State of California were filed against Barbara Williams, and subsequent thereto she pled guilty to said charges.

is frivolous or taken solely for the purpose of delay or where any party shall have required in the typewritten or printed record on appeal the inclusion of any matter not reasonably material to the determination of the appeal, or has been guilty of any other unreasonable infraction of the rules governing appeals, the reviewing court may impose upon offending attorneys or parties such penalties, including the withholding or imposing of costs as the circumstances of the case and the discouragement of like conduct in the future may require," was based upon Section 75(e) of the Federal Rules of Civil Procedure. (Formerly codified in scattered sections of 28 U.S.C.A., now covered under the Federal Rules of Appellate Procedure, 28 U.S.C.A.).

Witkin, *Costs on Appeal*, 17 So. Cal. L.R. 256, 259 (1944);

Deering's, *California Rules of Court*, 26(a) 232, 233 and n.(a) (1968);

23 West, *Court Rules*, 26(a) 319, 320 and n.(a) (1964).

Rules of Court and Appellate procedure from other jurisdictions employing the language "frivolous appeal" as used in California Rule of Court 26(a), has been judicially condoned by the United States Supreme Court. *Dunscombe v. Sayle* (5th Cir. 1965), 340 F. 2d 311, *cert. den.* 382 U.S. 814, 86 S. Ct. 32, 15 L. Ed. 2d 62 (1965); *Lowe v. Willacy* (9th Cir. 1956), 239 F. 2d 179; *Griffin Wellpoint Corp. v. Munro-Langstroth, Inc.* (1st Cir. 1959), 269 F. 2d 64; *Ginsburg v. Stern* (3rd Cir. 1961), 295 F. 698.

The cases of *Dunscombe v. Sayle, Lowe v. Willacy, Griffin v. Wellpoint* and *Ginsburg v. Stern, supra,* in-

volved the subject of penalties for frivolous appeals under Federal Rule of Appellate Procedure 38, drawn under authority of 28 U.S.C. Section 2072, as amended by the act of November 6, 1966, 80 Stat. 1223 effective July 1, 1968 by order of the Supreme Court, dated December 4, 1967, which provides:

> "If a court of appeal shall determine that an appeal is frivolous, it may award just damages and single or double costs of the appellee."

Similarly, it has been held that Title 28 U.S.C.A. Section 1912 confers power upon the United States Supreme Court and Court of Appeals to impose double costs to prevent frivolous appeals. *Armory v. Armory* (N.Y. 1876), 91 U.S. 356; 1 Otto 356; 236 L. Ed. 436.

Equally unavailing is the Petitioner's last contention that the imposition of a "penalty" under California Rules of Court 26(a) is impermissible due to vagueness of the term "frivolous appeal," for in most jurisdictions throughout the United States, it is uniformly held that the reviewing court may assess a penalty or damage on a finding that the appeal was frivolous or for the purpose of hindering or delaying. 5 Am. Jur. 2d Section 1024; *Southern R. Co. v. Gadd*, 233 U.S. 572; 58 L. Ed. 1099; 34 S. Ct. 696; *Massachusetts Bonding & Ins. Co. v. Fentz* (C.A. 8 Mo.), 182 F. 2d 752; *Stoddart v. Golden*, 179 Cal. 663; 178 Pac. 707; 3 A.L.R. 1060; *Lyons v. Hall* (La. App.), 90 So.2d 519; 60 A.L.R. 2d 1003; *Handy Cafe, Inc. v. Costello Distributing Co.*, 334 Mass. 707; 137 N.E. 2d 218, *cert. den.* 353 U.S. 932; 1 L. Ed. 2d 756; 77 S. Ct. 811; *Mead v. Rudnick*, 306 Mass. 616; 35 N.E. 2d 485; *Greenough v. Greenough*, 354 Mich. 508; 93 N.W. 2d 391; *Maywood v. Logan*, 78 Mich. 135; 43 N.W. 1052;

De Mayo v. Lyons (Mo.), 243 S.W. 2d 967; *Jones-Downes Co. v. Chandler,* 13 N.M. 501; 85 Pac. 392; *Pollard v. Borneman,* 47 S.D. 622; 201 N.W. 525; 36 A.L.R. 954; *Solomon v. Brown Shoe Co.* (Tex. Civ. App.), 50 S.W. 2d 907.

Judicial concern for promoting the orderly and efficient administration of justice by preventing frivolous appeals is no recent judicial invention, for as early as 1879, Chief Justice Waite, speaking of frivolous appeals, in the case of *Whitney v. Cook* (Miss. 1879), 99 U.S. 607; 900 Otto 607; 25 L. Ed. 446 stated at page 446:

> "Our experience teaches us that the only way to discourage frivolous appeals and writs of error is by the use of our power to award damages. . . ."

Unquestionably then, through years of common usage and judicial interpretation the words "frivolous" and "frivolous appeals" are neither vague or undefinite, nor can it be cogently argued that the public is uncertain as to a course of conduct required by Rule 26(a), or that Judges are left free to decide without any legal standards what is prohibited and what is not in each particular case. (*Giaccio v. Pennsylvania,* 382 U.S. 399; 15 L. Ed. 2d 447.)

The mandate of Rule 26(a), as applied to the case at bar is simple, and contrary to the contentions of the Petitioner, it does not preclude a judicial review of adversely determined rights, it merely emphasizes a rule of necessity to the orderly administration of justice, to wit:

> Do not urge on appeal that a reasoned decision by the states' highest court is no longer the law, without some supporting authority.

IV.

There Is No Federal Question Involved.

The decision of the Supreme Court of the State of California denying the petition for hearing was based solely on the following state issues:

1. The propriety of the California District Court of Appeal's action in preventing frivolous appeals by the imposition of penalties, pursuant to California Rules of Court 26(a), and

2. The issues as to whether an assignee of a person convicted of bribery is in a position to assert his ownership and right to possession of money actually used in the perpetration of a crime, and whether he may enlist the aid of the courts of California to have such money restored to him.

It is respectfully submitted that these matters are of state concern only and do not involve the federal constitution in any way.

It is well recognized that the decisions of the highest court of the State on matters of state law are generally conclusive upon the Supreme Court of the United States. *Huddelston v. Dwyer,* 322 U.S. 232, 236; *Neblett v. Carpenter,* 305 U.S. 297, 302.

It is peculiar province and privilege of the state courts to construe their own statutes. The power delegated to the United States Supreme Court is for restraint of unconstitutional legislation by the States and not for the correction of alleged errors committed by their judiciary. *Hooker v. Los Angeles,* 188 U.S. 314; 47 L. Ed. 478; *McNulty v. California,* 149 U.S. 645; 37 L. Ed. 882.

It is submitted that the decision of the Supreme Court of California in *Lee On v. Long* (1951), 37 Cal. 2d 499, *cert. den.* 342 U.S. 947; 96 L. Ed. 704; 72 S. Ct. 553, is controlling upon this Court as to all matters passed upon therein. *Neblett v. Carpenter, supra.*

As no federal questions are presented, the Court has no jurisdiction to review the proceedings. 28 U.S.C.A. 1257(3).

Conclusion.

The appeal does not disclose that the highest Court of the State of California has decided a federal question in conflict with applicable decisions of this Court, or that its decision rested upon a necessary federal ground, or that it decided a federal question of substance not therefor determined by this Court.

Respondents urge therefore, that the Petitioner presents no substantial question for decision by this Court; that the judgment sought to be appealed from should be affirmed or the appeal dismissed.

Respectfully submitted,

ROGER ARNEBERGH,
City Attorney,
Attorney for Respondents.

APPENDIX A.

Amended Complaint for Claim and Delivery.

Superior Court of the State of California, for the County of Los Angeles.

Burton Marks, Plaintiff, vs Thad Brown, Chief of Police of the City of Los Angeles; City of Los Angeles, a municipal corporation; Does II through X, Inclusive, Defendants. No. 898 013.

PLAINTIFF ALLEGES:

I.

The true names or capacities, whether individual, corporate, associate or otherwise, of Defendants named herein as DOES II through X, Inclusive, are unknown to Plaintiff, who therefore sues said Defendants by such fictitious names. Leave of this Court will be sought to amend this Complaint to show their true names and capacities when the same have been ascertained.

II

At all times herein mentioned, the Defendant CITY OF LOS ANGELES, was, and now is, a municipal corporation, organized and existing under and by virtue of the laws of the State of California.

III

At all times herein mentioned, the Defendant THOMAS REDDIN was, and now is, the duly authorized and acting Chief of Police of the City of Los Angeles and the legally appointed successor to the original named Defendant Thad Brown.

IV

Prior to the commencement of this action, Plaintiff was assigned all of the right, title and interest in and to that certain personal property hereinafter described, and Plaintiff, prior to the commencement of this action, was, and now is, entitled to the possession as assignee of said personal property, which property is more particularly described as follows:

1. $220.00 in cash taken from Plaintiff's assignor on August 4, 1965, which sum was taken in connection with and is held and segregated under Los Angeles Police Department DR No. 65-53796.

2. $3,300.00 in cash taken from Plaintiff's assignor on August 26, 1965, which sum was taken in connection with and is held and segregated under Los Angeles Police Department DR No. 65-53796.

3. $8,500.00 in cash taken from Plaintiff's assignor on September 7, 1965, which sum was taken in connection with and is held and segregated under Los Angeles Police Department DR No. 65-53796.

V

On said dates, and thereafter, to and including the present time, Defendants, without the consent of Plaintiff or Plaintiff's assignor, had said property in their possession; defendants still retain possession of said personal property and unjustly claim to be the owner of same.

VI

Defendants unlawfully withhold said property from Plaintiff's possession, to Plaintiff's damage in the sum of $12,020.00.

WHEREFORE, Plaintiff prays judgment against the Defendants and each of them, as follows:

1. For possession of said personal property or its value in said sum of $12,020.00 in case delivery thereof cannot be had.

2. For interest on said sum at the legal rate of 7% per annum from the respective dates on which said personal property was unlawfully obtained;

3. For costs of suit; and

4. For such other and further relief as to the Court seems just and proper.

Harvey A. Schneider
Harvey A. Schneider
Attorney for Plaintiff

APPENDIX B.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Four.

Burton Marks, Plaintiff and Appellant, vs. Thomas Reddin, as Chief of Police of the City of Los Angeles, and the City of Los Angeles, Defendants and Respondents. Civ. No. 33712.

Filed Oct. 23, 1969.

APPEAL from a judgment of the Superior Court, Los Angeles County. Arnold Praeger, Judge. Affirmed.

Judgment for Defendants in a complaint for claim and delivery, affirmed.

Marks, Sherman & London and Burton Marks (in propria persona) for Plaintiff and Appellant.

Roger Arnebergh, City Attorney (Los Angeles), John A. Daly and George J. Franscell, Assistant City Attorneys, and William B. Burge, Deputy City Attorney, for Defendants and Respondents.

Plaintiff, an attorney at law, sues, as the assignee of Barbara Williams, to recover $12,020, held by the Chief of Police of the City of Los Angeles. As disclosed by the pleadings and record, the Defendants came into possession of this sum of money under the following circumstances:

Barbara Williams was interested in assisting Vine Stevens, Catherine Adams and Keki Williams, who were being prosecuted, or who were in danger of being prosecuted, for certain criminal conduct, and to secure the arrest and prosecution of Miller Guy and Nido Lee. In that connection, she paid the total sum of $12,020

to Officer Franey of the Los Angeles Police Department, for the following purposes:

(a) August 4, 1965, $220 as partial payment of $500 for obtaining a continuance in a sentencing matter of Vine Stevens ($20 of this sum was to reimburse Officer Franey for long distance telephone calls).

(b) August 26, 1965, $3,300, of which $1,500, or so much thereof as Franey decided was needed to be used as restitution to the victim of a bunco scheme perpetrated by Catherine Adams in order to stop the prosecution of said Catherine Adams, Officer Franey to keep any balance of said $1,500 for himself; and $1,000 for Officer Franey to use to "fix" the case against Catherine Adams, that is to fix the case so it wouldn't be prosecuted.

(c) August 26, 1965, $300 as the balance of $500 promised Officer Franey for obtaining a continuance for the sentencing of Vine Stevens.

August 26, 1965, $500 to arrest Miller Guy and Nido Lee.

(d) September 27, 1965, $8,500 of which $6,500 was "to take care of it so Cathy (Catherine Adams) won't be prosecuted" and a warrant for Keki Williams be withhheld or withdrawn on a charge which Officer Franey had previously annulled. Officer Franey was to use part or all or more of this sum as restitution to the victim and to keep any balance for himself; and the sum of $2,000 as payment to Officer Franey for not prosecuting either Catherine Adams or Keki Williams.

At all times, Officer Franey was acting in the course and scope of his duties as a police officer with the

knowledge of and under the orders of his superiors; he received the monies in that capacity and without intent to be influenced in any official action; he turned the monies, as received, over to his superiors and they are held by the defendant city in segregated accounts. Barbara Williams has pled guilty to a violation of section 67 of the Penal Code (bribery) in connection with the transactions above set forth.

The trial court entered judgment for defendants on the ground that plaintiff had not filed a claim was required by the Government Code and on the ground that plaintiff was barred from recovery on grounds of public policy. Since we affirm on the latter ground, we need not consider whether or not plaintiff's claim, if otherwise cognizable, falls within the claims statute.

Plaintiff argues as follows:

(1) To permit the city to keep the money is a "forfeiture" prohibited by the Penal Code and by the Constitution.

(2) That even if a bribe was involved, not all the money was tainted by a bribe, and therefore plaintiff was entitled to some of the money.

(3) There was no contract between the police officer and the assignor.

I

Plaintiff's contention that allowing the city to keep the money is a "forfeiture" prohibited by Penal Code Section 2604 is not well taken. The Court in the case of *Lee On v. Long* (1951) 37 Cal.2d 499, stated in part as follows:

> "Consistent with the general rule governing the construction of statutes involving forfeitures (12

Cal.Jur. § 3, pp. 633-634), the trial court properly recognized the limits of its express statutory authority and denied the county's petition for forfeiture 'as far as the money [was] concerned.' (*Cf. Chapman v. Aggeler*, 47 Cal.App.2d 848, 860-861 [119 P. 2d 204].) *However, the present case on appeal does not concern the law of forfeitures, but rather relates to the question of whether plaintiffs, admittedly engaged in illegal gambling activities at the time of the raid and their arrest, are in a position to assert their ownership and right to possession of the money that was then in actual use in such activities, and to enlist the aid of the court in seeking to have it restored to them.*

" 'No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out; nor can he set up a case in which he must necessarily disclose an illegal purpose as the groundwork of his claim.' (17 C.J.S. § 272, p. 656.)" (Emphasis added.)

Plaintiff argues that the *Lee On* case is "not the law of this state any longer." Plaintiff cites no case overruling *Lee On*, and our own research has not disclosed any. Nor are plaintiff's attempts to distinguish *Lee On v. Long* from the instant case persuasive. The principles of law are the same whether the facts involved gambling, as in *Lee On*, or a bribe, as in the instant case.

II

Plaintiff next argues that, even assuming some illegal transaction, not all of the transactions were tainted. The rule is that a party to an illegal contract may not successfully invoke judicial aid to have his illegal objects carried out, nor set up a case in which he must necessarily disclose an illegal purpose as a basis for his claim. The test is whether the plaintiff can establish his case otherwise than through the medium of an illegal transaction to which he himself is a party. (*Lee On v. Long, supra* (1951) 37 Cal.2d 499.) Since plaintiff cannot establish his case without raising the illegal transactions, whether or not each and every individual transaction, considered alone and not in the context of a series of transactions, is in itself illegal, does not help plaintiff's case.

Further, it is clear that all the moneys given by Officer Franey were related to illegal transactions. The word "bribe" is defined as follows:

> "The word 'bribe' signifies anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given in his action, vote, or opinion, in any public or official capacity;" (Pen. Code, §7, subd. 6.)

A bribe contemplates a promise to give a public officer anything, which may have a future existence and value, with the intent to unlawfully influence him in his official action. (*People v. Vincilione* (1911) 17 Cal. App. 513, 515.) It is clear that plaintiff's assignor in the case at bench was attempting to unlawfully influence the officer in his official action in each transaction.

Plaintiff argues that some of the money was paid to Officer Franey to be paid by him to the victims of the various fraudulent transactions indulged in by the persons arrested or suspected of such crimes and that reimbursement of victims is a lawful—even a commendable—act and not illegal. But the arrangement was that the officer could keep for himself all monies not needed to satisfy the several victims; as far as the record discloses, the victims might have been satisfied with minimal amounts. It follows that plaintiff cannot segregate any specific sum that was devoted to a lawful purpose, even if he legally could disengage the parts of single payments. Since the record does not disclose the purpose of the telephone calls involved in the August 4th payment, we cannot say that they were not made as part of the over-all bribery scheme.

III

Plaintiff contends that he is entitled to recover because a contract was never formed between Officer Franey and plaintiff's assignor. The court in the *Vollmann* case said: "In this connection it must be remembered that no 'meeting of the minds' is required to establish an agreement to take a bribe." (*People v. Vollmann* (1946) 73 Cal.App.2d 769, 788.) Further, in *Schur v. Johnson* (1934) 2 Cal.App.2d 680, it was held that courts will not lend aid to transactions founded on illegal contracts *or* acts in violation of law. And in *Berka v. Woodward* (1899) 125 Cal. 119, the California court, quoting from an earlier case, said that no court shall lend its aid to a man whose grounds for action are based on an illegal or immoral act.

Thus, the existence or nonexistence of a contract is irrelevant. It is clear that the money was given with a

corrupt intent by plaintiff's assignor to influence official action, and that is sufficient to preclude plaintiff from using the courts to recover money.

The judgment is affirmed. The appeal is strictly frivolous. In addition to the usual costs on appeal, appellant shall pay, to the clerk of this court, the sum of $250 as a penalty for taking a frivolous appeal.

Kingsley, *J.*

We concur:

Jefferson, *Acting P. J.*
Dunn, *J.*

Certified for nonpublication in the Official Reports pursuant to rule 976.

Jefferson, *Acting P. J.*
Kingsley, *J.*
Dunn, *J.*

SUPREME COURT, U. S.

MAR 13 1970

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969

No. 1107

BURTON MARKS,

Petitioner,

vs.

THE CHIEF OF POLICE OF THE CITY OF LOS ANGELES and THE CITY OF LOS ANGELES,

Respondents.

ON APPEAL FROM THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT

PETITIONER'S BRIEF IN OPPOSITION TO MOTION TO AFFIRM JUDGMENT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 1107

BURTON MARKS,

Petitioner,

vs.

THE CHIEF OF POLICE OF THE CITY OF LOS ANGELES and THE CITY OF LOS ANGELES,

Respondents.

ON APPEAL FROM THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT

PETITIONER'S BRIEF IN OPPOSITION TO MOTION TO AFFIRM JUDGMENT

1. According to respondents' Motion to Affirm, the facts in the Court of Appeal's opinion "must be accepted as true, since the Petitioner herein in filing his petition for rehearing before that Court under Rule 28(b) of the Rules on Appeal and [*sic*] adopted by the Judicial Council of the State of

California, never requested a correction of the record to that Court before filing his petition for hearing in the California Supreme Court" (Motion to Affirm at page 2).

While it is not clear which version of Rule 28(b) respondents refer to, it is clear that it is not the Rule 28(b) now in force and in force at the time of the Court of Appeal's decision and at the time the petition for rehearing was filed by petitioner. (Petitioner is informed that there is a new Rule 28(b) proposed by the Court of Appeal which would provide, in essence, that if objections were not made to the statement of facts set forth in the opinion by the Court of Appeal, the facts would be deemed to be true.) The present Rule 28(b) provides that:

> "**(b) [Time for filing petition]** A party seeking a hearing must serve and file a petition therefor within 10 days after the decision of the Court of Appeal becomes final as to that court, except that a petition may not be filed after denial of a transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. Proof shall be made of the delivery or mailing of three copies of a printed petition or a petition prepared by other process of duplication in lieu of printing or one copy of a typewritten petition to the clerk of the Court of Appeal which rendered the decision. When such copies are delivered to the clerk of the Court of Appeal, he shall forthwith transmit to the clerk of the Supreme Court the original record, briefs, and all original papers and exhibits on file in the cause. If the petition is denied, the clerk of the Supreme Court shall return them to the clerk of the proper Court of

> Appeal. If the petition is granted, they shall be retained and properly numbered by the clerk of the Supreme Court."

A brief reading of Rule 28(b) indicates that one of the principal thrusts of the respondent City's argument (an alleged legal presumption of petitioner's agreeing with the facts in the Court of Appeal opinion by his failure to request a correction) is egregious error.

2. It is clear, both from petitioner's moving papers and from the Court of Appeal's decision, that federal, *e.g.*, Constitutional, questions were both raised and considered below. The assertion to the contrary at page 6 of the Motion to Affirm is a misstatement of the record.

Petitioner attacked the imposition of the penalty for his "frivolous" appeal at the earliest point, that is, after the penalty had been imposed, and raised it before the California Supreme Court. That Court's denial of a hearing when such a hearing is sought by a petitioner seeking to have a statute declared unconstitutional is, in effect, a determination that the statute in question is constitutional.

The Court of Appeal *did* consider petitioner's assertion that the "*pari delicto*" reasoning of *Lee On v. Long*, 37 Cal. 2d 499 (1951), worked a forfeiture against petitioner. (Again, the respondent City, in its Motion to Affirm, has misstated the record in this respect, at page 6 of that motion.) The Court of Appeal rejected the argument and, in fact, rejected it to the extent that it deemed it to be "frivolous" and, therefore, the subject of a penalty against the petitioner for having the temerity to raise the argument.

Petitioner sought all available review in the state courts, asserting federal constitutional objections throughout, com-

mencing at the time of trial and through the appellate courts, all of which arguments were rejected by these courts. These objections were timely made, and the rejections were a determination on the merits. Petitioner therefore respectfully submits that this Court has jurisdiction on this appeal and that the questions have substance and should be considered by this Court, and that the Motion to Affirm or Dismiss should be denied.

Respectfully submitted,

MARKS, SHERMAN & LONDON

BY BURTON MARKS

Attorneys for Petitioner

State of California)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned a citizen of the United States and employed in the County of Orange, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 315 Third Street, Huntington Beach, California 92646, that on MARCH , 1970, I served the within PETITIONER'S BRIEF IN OPPOSITION TO MOSTION TO AFFIRM JUDGMENT (No. 1107) on the following named parties by depositing the designated copies thereof in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

COUNTY CLERK, COUNTY OF LOS ANGELES
111 NORTH HILL STREET
LOS ANGELES, CALIFORNIA 90012
FOR: HON. ARNOLD PRAEGER, JUDGE of the Superior Court
[1 copy]

CITY ATTORNEY, CITY OF LOS ANGELES
2102 CITY HALL
LOS ANGELES, CALIFORNIA 90012
[2 copies]

THE SOLICITOR GENERAL OF THE UNITED STATES
WASHINGTON, D. C.
[2 copies]

COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
217 WEST FIRST STREET
LOS ANGELES, CALIFORNIA 90012
[3 copies]

I declare under penalty of perjury that the foregoing is true and correct.

Executed on MARCH , 1970, at HUNTINGTON BEACH, CALIFORNIA.

_____
D. A. Standefer

41 copies to Supreme Court of the United States,
Washington, D. C.

SUPREME COURT OF THE UNITED STATES

October Term, 1969

MARKS *v.* CHIEF OF POLICE OF CITY OF LOS ANGELES ET AL.

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

No. 1167. Decided March 23, 1970

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.